Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOHN C. MANDANICI, JR.
PETITIONER

v.

TOWN OF MONROE
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

1 In light of this Court's recent decision in Dolan v. City of Tigard, 512 U.S. __ , (1994), did the respondent, which is a local government, violate the constitutional prohibition against taking private property without just compensation when it demanded as a condition of approving the petitioner's subdivision application that the petitioner deed to the respondent 10% of the subdivision even though the respondent never made an individualized determination that the land it demanded was related both in nature and extent to the impact of the subdivision and the respondent actually admits that it has not had any discussions or plans to use the land?

2 In light of this Court's recent decision in Dolan v. City of Tigard, supra, did the Connecticut courts correctly rule that it is the landowner rather than the local government which has the burden of proof on the issue of whether the local government's demand for land as a condition for zoning approval is not justified?

B. LIST OF PARTIES.

The parties are the same as in the caption of the case, to wit: the petitioner John C. Mandanici, Jr., and the respondent, the Town of Monroe, Connecticut. Said parties were the only parties who appeared and who were involved in the petitioner's appeal to the Appellate Court of Connecticut whose judgment on that appeal the petitioner now seeks this Court to review. Other parties were involved at the trial level concerning the respondent's original complaint against the petitioner but they were not involved in the petitioner's unrelated counterclaim that the petitioner brought against only the respondent and which was the subject of the said appeal and now the subject of this Petition.

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D. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS.

The opinion of the Appellate Court of Connecticut on the petitioner's direct appeal is officially reported as Town of Monroe v. John C. Mandanici, Jr., et al. 34 Conn. App. 915(1994). The opinion is unofficially reported at 642 A2d 759(1994), and is reprinted in the Appendix to this Petition, App. 2a. The petitioner's timely filed Petition For Certification was denied by the Supreme Court of Connecticut and that decision is officially reported as Town of Monroe v. John C. Mandanici Jr., et. al, 231 Conn. 929(1994). That decision is not yet unofficially reported. It is reprinted in the Appendix to this Petition, App. 5a.

E. STATEMENT OF GROUNDS OF JURISDICTIONT

The judgment of the Appellate Court of Connecticut was entered on May 24, 1994. The Appellate Court on June 22, 1994, denied the petitioner's timely filed Motion For Reargument And Reconsideration, and Motion For Reargument En Banc (App. 3a, 4a). The Supreme Court of Connecticut on October 13, 1994, denied the petitioner's Petition For Certification (App. 5a).The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Sec. 1257(a).

F. CONSTITUTIONAL PROVISIONS

The Fifth Amendment states:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment states:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

G. STATEMENT OF THE CASE

The respondent, Town of Monroe, demanded that the petitioner, John C. Mandanici, Jr., deed to the respondent 10% of his proposed subdivision as a condition for the respondent's approval of that subdivision. The respondent in its demand relied on a subdivision regulation which alllowed it to take an unspecified percentage of land in a proposed subdivision for the specific purpose of using that land as "open spaces for parks and playgrounds". The petitioner deeded the land, consisting of 1.26 acres, to the respondent and the respondent approved the subdivision. As a counterclaim to a later tax case brought by the respondent, the petitioner claimed that the respondent had used imposition and duress to cause the petitioner to deed the said land to the respondent, and furthermore he claimed that the land that had been taken was not being used for any purpose and certainly not for the purpose for which it was taken, and thus he claimed that the taking did not substantially advance the legitimate state interest of the respondent. The petitioner asserted that the respondent had violated the petitioner's federal constitutional right against private property being taken for public use without just compensation. The petitioner relying on common law claimed that since imposition and duress were used by the respondent to get the land, then the respondent held the land in a constructive trust and should return it to the petitioner.

At the hearing on the counterclaim in 1993, Daniel Tuba, the respondent's Town Clerk, Clerk of the Planning and Zoning Commission, and clerk of the Zoning Board of Appeals, testified that there was a "long standing policy" of

the respondent to require an applicant for a subdivision of 10 plus building lots or 10 plus acres to deed to the respondent 10% of the total subdivision as open spaces. The demand was pursuant to Section 3.4 of the subdivision regulations which allowed the respondent to demand an unspecified amount of open spaces as a condition of zoning approval. Tuba testified that the petitioner's subdivision was such a 10 plus lot subdivision and that the land he deeded to the respondent constituted 10% of the subdivision(Trial transcript of July 15, 1993, hereafter referred to as T., pp. 63-68).

Tuba further testified that a study was never done as to whether the 10% parcel of land given up by the petitioner was needed to fulfill the needs of the respondent(T 115). He testified that the 10% parcel of land given up by the petitioner was not needed for any rights of way or easements(T 77). He testified that the respondent has not had any discussions or plans to use the 10% parcel of land nor was there any present intention as to what will be done with the parcel(T 73-75).

The trial court factually found that the respondent's attorney had "insisted on the (petitioner) providing a deed" for a parcel of open spaces which constituted 10% of his 11 lot subdivision. The court found that the respondent "requir(ed) of all subdivisions of 10 or more lots" "approximately ten percent of the development" to be deeded to the respondent as open spaces. The trial court found that the respondent's attorney was relying on a subdivision regulation which allowed the respondent to receive as open spaces an unspecified percentage of any subdivision as a condition for giving approval for the subdivision. As noted by the trial court, the petitioner testified that he "did not want to give" up the land but believed that he "had to give up" the land to get the approval. The petitioner gave up the land in 1986 and received the approval for a 10 lot subdivision. The trial court found that the land from 1986 to the present time "has not been used in any manner by the (respondent) or anyone else nor had it been used as a park or playground".(App. 7a - 9a). Despite the above finding, the trial court ruled that the demand for the open spaces was constitutional under Nollan v. California, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677(1987), and that the demand was proper under the zoning regulations that allowed the respondent to demand land for

parks and playgrounds as a condition for the approval of a subdivision(App 9a - 11a).

The petitioner consistently asked the Appellate Court of Connecticut to await this Court's decision in Dolan v. City of Tigard, 512 U.S. - , 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994),prior to making a ruling. In a Motion To Postpone Oral Argument dated April 21, 1994, at oral argument on April 27, 1994, and in his Motions For Reargument dated June 2, 1994, the petitioner informed the Appellate Court of the issues in and the pendency of the Dolan case and asked the court to await that decision. However, the Appellate Court issued its terse per curiam decision(App. 2a) and denied the Motions For Reargument (App. 3a , 4a) prior to the release of the Dolan decision. After the Dolan decision was announced, the petitioner timely filed a Petition For Certification to the Supreme Court of Connecticut in which he stressed the importance of the Dolan decision. However, the Supreme Court of Connecticut denied the Petition without comment (App. 5a).

H. STAGE AT WHICH FEDERAL QUESTIONS WERE RAISED.

In his counterclaim filed in the trial court, the petitioner claimed that the "actions of the (respondent) in using duress and imposition to cause the (petitioner) to quitclaim said land as a condition for approving his subdivision were acts that violated his rights against private property being taken for public use without just compensation, said rights being enumerated in ... the Fifth and Fourteenth Amendments to the United States Constitution."(Counterclaim, par. 5).

In his briefs to the trial court, the petitioner repeated his above constitutional claim and relied heavily on Nollan v. California,, supra, where this Court discussed the conditions a local zoning authority must meet so that its demanding land as a condition of zoning approval does not become a taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments. (See petitioner's Trial Brief dated July 14, 1993, pp. 4-5; and his Reply And Supplemental Brief, dated August 13, 1993, pp. 2-3,9-10). The trial court rejected the petitioner's said constitutional

claims and Nollan arguments by first factually ruling that the land taken in 1986 could be developed in the future as a park or playground, and was presently being used in 1993 for "light and air" as mentioned in the preamble to the Subdivision Regulations(App 8a- 10a). The trial court ruled that such a taking as a condition for the approval of a subdivision substantially advanced a legitimate state interest and thus did not violate the principles set forth in Nollan v. Calif., supra, and did not violate the Fifth and Fourteenth Amendments' prohibition against private property being taken without just compensation. (App. 6a, 10a - 11a).

Concerning a connection between the land taken and the impact of the subdivision, the trial court essentially ruled that the approval of the subdivision would obviously result in additional residents who would live on the subdivision but who would also require recreational opportunities in the immediate area. The trial court referred to the portion of the respondent's Master Plan on Recreation and Open Space which states that "opportunities for passive and active recreation in locations accessible to residents and preservation of the ecological balance and exhaustible natural resources of the area are essential to the continued health and economic well being of the community." The trial court stated that such open spaces were needed to be "within a reasonable distance of all residents' homes." (App. 11a). The trial court concluded that the taking of the land was not unconstitutional but a valid exercise of the respondent's police powers.(App. 10a - 11a)

The trial court also ruled that the petitioner had the "heavy burden" of proving "beyond all reasonable doubt" that the taking was unconstitutional. (App. 10a).

In his brief to the Appellate Court of Connecticut, the petitioner argued that the constitutional principles set forth in Nollan v. Calif., supra, were violated because there was no substantial advsancement of a legitimate state interest by taking land to be unused and vacant, and further argued that there was no real connection between the land taken and the impact of the subdivision. (See petitioner's brief to the Appellate Court, pp. 24-30). The Appellate Court denied the petitioner's repeated requests to postpone any decision until the case of Dolan v. City of Tigard, supra, was decided by this Court. (See petitioner's Motion To Postpone Oral

Argument, dated April 21, 1994; transcript of oral argument of April 27, 1994; and Motions For Reargument, dated June 2, 1994). One month before this Court's release of its decision in the Dolan case, the Appellate Court on May 24, 1994, affirmed without an opinion the rulings of the trial court regarding the petitionerr's constitutional claims. (App. 2a).

In his Petition For Certification to the Supreme Court of Connecticut timely filed after the release of the Dolan decision, the petitioner repeated his above constitutional calims and further argued that the taking also violated the constitutional principles set forth in the Dolan decision. The petitioner claimed that under Dolan there should be an individualized determination by the respondent that the open spaces taken were related in nature and extent to the impact of the subdivision. He also claimed that under Dolan, the respondent had the burden of proof. He stated that there was no such individualized determination concerning the taking of his land and that the trial court had placed the burden of proof on him. He also argued that the Dolan decision was retroactive and applicable to his case. (See petitioner's Petition For Certification to the Supreme Court of Connecticut, dated July 11, 1994, pp. 1-3, 6-12). The Supreme Court denied the Petition without comment.(App. 5a).

J. ARGUMENT

1. UNCONSTITUTIONAL TAKING

The petitioner claims that the respondent violated his federal constitutional right against private property being taken without just compensation. In Dolan, supra, 114 S. Ct. 2316, it was noted that the "Takings Clause of the Fifth Amendment of the United States Constitution made applicable to the States through the Fourteenth Amendment (citation omitted) provides: Nor shall private property be taken for public use without just compensation." The Court further observed that "(w)e see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amentment or Fourth Amendment should be relegated to the status of a poor relation". Id., 2320.

In Nollan, supra, 483 U.S. 837, this Court stated that some zoning boards have an "out and out plan of extortion" to get landowners to give up property rights in order to get zoning approval. The Court also held that whenever a landowner must yield a property interest to get zoning permission, such a "yielding of a property interest can not be regarded as establishing (a) voluntary exchange." Id. 834, n. 2.

When this Court in Nollan discussed "extortion" by zoning boards, Id. 837, it cited J.E.D. Associates, Inc. v. Atkinson, 121 N.H. 581, 584, 432 A2d 12, 14-15(1981), and in that case the court held that the subdivision regulation that previously caused a developer to deed land to the town for playgrounds as a condition for approval of his subdivision was an unconstitutional regulation. The court ordered the town to give back the land to the developer while leaving the approval of the subdivision intact.

In Dolan, supra. 114 S. Ct. 2317, this Court cited J.E.D., as the single authority for its holding in Nollan that the government authority in that case was "simply trying to obtain an easement through gimmickry, which converted a valid regulation of land use into 'an out- and - plan of extortion' ". Thus this Court in both Nollan and Dolan relies on a case similar to the present case where a landowner is trying to get the land back that he had been required to give away to get zoning approval. [1]

---

1. In the present case, the legal mechanism of a constructive trust based on common law principles allows the petitioner to regain his property. (See petitioner's brief to the Appellate Court, pp. 14-17). The elements of imposition and duress needed to trigger a constructive trust were present since there was surely a type of "extortion" as mentioned in the Nollan and Dolan cases, and also as mentioned in Nollan, supra, 483 U.S. 834, n. 2, the "yielding of a property interest [to get zoning approval] cannot be regarded as establishing (a) voluntary exchange." There is no statute of limitations regarding a constructive trust but a government could always raise a defense of laches which was not raised in the present case.

In Nollan, this Court held that there are two requirements that must be met in order for a government not to commit extortion nor violate the Constitution when it demands property as a condition for zoning approval. As will be discussed later, this Court in Dolan refines the second requirement. In Nollan, supra, 483 U.S. 834, this Court held that for a government to require a landowner to give up property rights as a condition of obtaining a permit, the property taken must "substantially advance legitimate state interests" and "effectuat(e) ... a substantial government purpose". The trial court in the present case found that the acre taken in 1986 "could, if and when the need develops, become a park or playground", it "is a passive park [which] ... can be utilized at any point", and "as it exists now, it provides light and air", and therefore it substantially advances a legitimate state interest. (App. 9a - 11a).

However, more on point the trial court conceded that from 1986 when the land was transferred and until the time of the court's decision in 1993, the land"has not been used in any manner by the (respondent) or anyone else nor had it been used as a park or playground", and it "has had no alterations or improvements to it since 1986" when the petitioner deeded it to the respondent. (App. 8a, 9a). Such a non use clearly does not substantially advance a legitimate state interest or a substantial governmental purpose.

Of greater importance than the above principle is the further ruling in Nollan that it is unconstitutional to require a landowner to give up a part of his property in order to get a lifting of a restriction on the use of the property in general when the part of the property that is given up "fails to further the end advanced as the justification" for the original restriction. Nollan, supra, 483 U.S. 837. There must be a "nexus between the condition [imposed on the landowner of giving up some property right] and the original purpose of the building restriction" which the landowner seeks to remove. Id. The government can not just impose a condition in order "to serve some valid governmental purpose .... In short, unless the ... condition [imposed of giving up some property right] serves the same governmental **purpose** as the development ban, the building restriction is not a valid regulation of land

use but 'an out and out plan of extortion' ". Id. (emphasis added).

"The **purpose** of a subdivision regulation is to ensure that the land as divided will be of such character that it can be used for building purposes without danger to health or the public safety." Tondro, Connecticut Land Use Regulation, The Atlantic Law Book Company (1992), p. 209. (emphasis added). When a subdivision plan shows that the buildings and roads to be placed on it will not pose a danger to health or public safety, then the original restriction on the subdivision is to be lifted. The landowner is then allowed to use the land in the same way and facing the same restrictions as any other landowner outside the subdivision. In the present case, the taking of the land did not lessen any type of danger to the public health or safety, nor would allowing the petitioner to keep the land pose any danger to the public health and safety. There is no nexus between the one acre that the petitioner was forced to give up and the danger to public health and safety justification for the original building restriction on the subdivision.

Even when such a nexus does exists, the taking still can be unconstitutional if the government demands more than it needs to neutralize the development's impact. This Court in Dolan answered the question left open in Nollan of what is the "required degree of connection" between the amount of land demanded by the government and "the projected impact of the proposed development". Dolan, supra, 114 S. Ct. 2317. This Court held that there must be a "rough proportionality" between the land demanded and the project's impact. Id. 2319. This Court also held that "(n)o precise mathematical calculation is required, but [the government] must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development", and it can not rely on its own "conclusory statement(s)" on the issue. Id. 2319-2320, 2322. This Court held that a finding that the land demanded "could offset some" of the development's impact was insufficient. Id. 2322.

In the present case, the respondent's Town Planner and Clerk of its zoning boards testified that no study was ever done as to whether the land demanded fulfilled any of the

respondent's needs, and that there were no prior or current discussions or plans as to what will be done with the land. (T pp. 115, 73-75). The trial court held that the land taken in 1986 "has not been used in any manner by the (respondent) or anyone else nor had it been used as a park or playground." (App. 8a). However, the trial court upheld the taking because the land "could if and when the need develops, become a park or playground", and it "is a passive park [which] ... can be utilized at any point", and "as it exists now, it provides light and air". (App. 9a - 11a). Such observations do not satisfy the standards of Nollan, nor the standards of Dolan regarding an individualized determination and rough proportionality.

Thus this Court should grant this Petition because the Connecticut courts have decided a federal question which clearly conflicts with this Court's decisions in the Nollan and Dolan cases. The Dolan decision is retroactive and controls the present case. "As a rule, judicial decisions apply 'retroactively' (citation omitted). Indeed, a legal system based on precedent has a built-in presumption of retroactivity." Solem v. Stumes, 465 U.S. 638, 642, 104 S. Ct. 1338, 79 L. Ed. 2d 579(1984), State of Connecticut v. Jackson, 32 Conn. App. 724, 731-732, n. 6, 630 A2d 164(1993). "(W)hen the Court has applied a rule of law to litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 544, 111 S. Ct. 2439, 115 L. Ed. 2d 481(1991)(Per Souter, J., with one Justice concurring and four Justices concurring in judgement).

For example, in the recent case of Harleston v. Jeffries, _____ U.S. ____, 63 L.W. 3385(Nov. 14, 1994), this Court in a summary disposition vacated a judgment and remanded the case to the Court of Appeals for the Second Circuit "for further consideration in light of Waters v. Churchill" 511 U.S. ___, 114 S. Ct. 1878, 128 L. Ed. 2d 686(1994). The Harleston case was decided by the Second Circuit on April 18, 1994(see 21 F.3d 1238), and the Waters case was decided by this Court six weeks later on May 31, 1994. Thus this Court remanded the Harleston case to the Second Circuit to consider an opinion of this Court which had not been released when the Second Circuit made its initial decision. A similar approach can be taken in the present case in which this Court remands

the case to the Appellate Court of Connecticut for further consideration in light of Dolan v. City of Tigard, supra.

2. BURDEN OF PROOF

This Petition should also be granted because the decisions of the Connecticut courts in this case on the burden of proof clearly conflicts with this Court's decision in Dolan regarding the burden of proof. In the present case, the trial court held that it was the petitioner's "heavy burden" to prove "beyond all reasonable doubt" that the taking was unconstitutional. (App. 10a). However, this Court in Dolan, held that the government "must make some sort of individualized determination" and in a footnote observed that the dissent was correct in stating that this Court was "placing the burden on the [government] to justify the required dedication." Dolan, supra, 114 S. Ct. 2319, 2320, n. 8. Thus the Appellate Court erred when it affirmed the trial court's ruling that the burden of proof was on the petitioner.

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K. APPENDIX

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1. THE OPINION AND JUDGMENT OF THE APPELLATE COURT OF CONNECTICUT UPON WHICH REVIEW IS SOUGHT, 34 Conn. App. 915, 642 A2d 759(1994)

TOWN OF MONROE V. JOHN C. MANDANICI, JR., ET AL(12922)

APPELLATE COURT, STATE OF CONNECTICUT
DUPONT,C.J., HEIMAN, and SCHALLER, JS.
Argued April 27--- decision released May 24, 1994

Action, in each case, to foreclose municipal tax liens on certain of the named defendant's real property, brought to the Superior Court in the judicial district of Fairfield, where the named defendant filed a counterclaim in each case; thereafter, the cases were consolidated and referred to Hon. Irving Levine, state trial referee; judgments of strict foreclosure on the complaints and for the plaintiff on the counterclaims, from which the named defendant appealed to this court.
Affirmed.

Joseph R. Mirrione, for the appellant (named defendant).

William T. Browne, with whom, on the brief, was William J. Varese, for the appellee (plaintiff).

PER CURIAM. The judgments are affirmed and the case is remanded for the purpose of setting new law days.

2. ORDER OF THE APPELLATE COURT OF CONNECTICUT DENYING REHEARING

NO. A. C. 12922
TOWN OF MONROE
VS.
JOHN C. MANDANICI,JR.

APPELLATE COURT
STATE OF
CONNECTICUT
JUNE 22, 1994

ORDER

THE MOTION OF THE DEFENDANT-APPELLANT, FILED JUNE 2, 1994, FOR REARGUMENT AND RECONSIDERATION HAVING PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D DENIED.

BY THE COURT,

Alan M. Ganusscio
ASSISTANT CLERK --
APPELLATE

3. ORDER OF THE APPELLATE COURT OF CONNECTICUT DENYING REHEARING EN BANC

NO. A. C. 12922
TOWN OF MONROE
VS.
JOHN C. MANDANICI, JR.

APPELLATE COURT
STATE OF
CONNECTICUT
JUNE 22, 1994

ORDER

THE MOTION OF THE DEFENDANT-APPELLANT, FILED JUNE 2, 1994, FOR REARGUMENT EN BANC HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D DENIED.

BY THE COURT

Alan M. Ganusscio
ASSISTANT CLERK -
APPELLATE

4. ORDER OF THE SUPREME COURT OF CONNECTICUT DENYING PETITION FOR CERTIFICATION

SUPREME COURT
STATE OF CONNECTICUT

NO. PSC-94-0111

TOWN OF MONROE

V.

JOHN C. MANDANICI, JR. ET AL

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the named defendant for certification to appeal from the Appellate Court (34 Conn. App. 915 [AC 12922]), it is hereby ordered that said petition be, and the same is hereby denied.

BY THE COURT,

Alan M. Gannuscio
ASSISTANT CLERK-
APPELLATE

Dated: October 13, 1994
Notice sent: `10/14/94

5. MEMORANDUM OF DECISION OF THE TRIAL COURT AFFIRMED BY THE APPELLATE COURT OF CONNECTICUT

CV 92 0293224 S : SUPERIOR COURT
CV 92 0294797 S

TOWN OF MONROE : J.D. OF FAIRFIELD
VS. : AT BRIDGEPORT
JOHN MANDANICI, : SEPTEMBER 22, 1993
JR., ET AL

MEMORANDUM OF DECISION

Two cases of foreclosure of tax liens have been filed by the Town of Monroe against premises owned by the defendant John C. Mandanici, Jr. and known as 2 and 36 Fairlea Drive. The plaintiff alleges unpaid tax liens for October 1, 1986, October 1, 1987, October 1, 1988, October 1, 1989 and October 1, 1990 on both lots. The defendant Mandanici answers in both cases are duplicates and consist of an admission of ownership and a denial of the remaining allegations. By way of counterclaims the defendant alleges that the Town by duress and imposition in 1986 caused him to agree to deed to the town 1.26 acres of open space land in order to have the subdivision, of which the open space land was a part, approved. He further claims that that parcel of land did not advance a legitimate state interest of the Town relative to the subdivision regulations, violates Article 1, Section 11 of the Connecticut Constitution and the Fifth and Fourteenth Amendments of the United States Constitution, that the Town is unjustly enriched and that the Town holds the parcel in constructive trust for the defendant. By way of set off, the defendant alleges that by duress and imposition the plaintiff forced the defendant to spend money and incur costs in making additional and unnecessary improvements to the road, landscape and drainage system in the subdivision which was not part of the original approval.

Since both cases are exactly alike and the cases have been tried as one, this one Memorandum of Decision shall apply to both cases. The parties have stipulated that Lot No. 4

Fairlea Drive, Monroe, has a fair market value of $85,000.00 and Lot No. 8 Fairlea Drive, Monroe, has a fair market value of $95,000.00. They have also stipulated that $14,861.25 is the total amount of town taxes, interest and fees due on Lot No. 4 and $13,235.28 is the total amount of town taxes, interest and fees due on Lot No. 8 and that both amounts are unpaid. On the basis of the facts stated, the plaintiff is entitled to a foreclosure of its tax liens on both lots. The issue therefore is the counterclaim and set off filed by the defendant.

The court will cover the Set Off first since it will not require an extended discussion. The defendant claims that by duress and imposition he spent money and incurred costs in making additional and unnecessary improvements to the road, landscape and drainage systems, which were not part of the town's original approval. No evidence has been produced to indicate that he spent money or incurred costs of any kind, or that any additional and unnecessary improvements to the road, landscape or draining systems were made. In fact, the Town's original approval containing its requirements for the subdivision were never submitted to the court nor was any evidence introduced of addional costs and unnecessary improvements being required by the Town or made by the defendant. This claim is without merit and judgment may enter for the plaintiff on the defendant's Set Off.

With respect to the question of the taking of an open space of 1.26 acres, the facts are found as follows. In 1976 the defendant was a partner of one Iannucci in the planned subdivision, and Iannucci submitted the subdivision map to the Town Planning and Zoning Commission (PZC) which contained the 1.26 acres area which was designated as open space and which the Land Division Regulations required and which reads as follows:

> 3.4 Open Spaces: In subdivisions proposed for residential development, open spaces for parks and playgrounds shall be provided in places deemed proper by the Commission. Such open spaces shall be offered to and accepted by the Town. Land reserved for open spaces shall be of such size, location, shape, topography and general character as to be useful to satisfy the needs determined by the Commission. Proper pedestrian and vehicular access shall be provided for each such reservation. Reservation of

land shall conform to any Town Master Plan pertaining to parks, playgrounds, recreation areas and open spaces.

The Commission in requiring the provision of open space shall consider the proper development of the Town, the density of population and existing public open spaces in the vicinity of the subdivision. No loam, fill or natural growth shall be removed from the area reserved for open space, and no foreign matter shall be permanently placed upon said space unless required by the Commission in connection with the grading, construction or development of the subdivision.

The submission of the parcel was not suggested or requested by anybody employed or authorized by the Town. It was offered by Iannucci because the subdivision regulations required it. The subdivision met with no success until 1986 when the defendant submitted the same map and a deed for the 1.26 acre parcel. Although the defendant describes the lot as a building lot, it does not contain the required 150 foot frontage on the highway, and could not be used unless a variance of that requirement was granted. The subdivision contained thirteen acres and had been subdivided into eleven lots, one of which was the parcel in issue and represented approximately ten per cent of the development which the PZC was requiring of all subdivisions of ten or more lots and for which the PZC usually required ten per cent of the total acreage. It is the defendant's claim that he did not want to give the parcel and that the PZC would not consider the subdivision unless the parcel was forthcoming and so the defendant furnished them with the deed. The parcel has not been used in any manner by the Town or anyone else nor had it been used as a park of playground which section 3.4 specifies. However, the Land Subdivision Regulations provide as follows: ". . . and to provide for open spaces for parks and playgrounds, for open spaces for recreation, light and air."

This court has difficulty in following the defendant's argument that he was subjected to duress and imposition. The zoning regulation required providing for open spaces for parks and playgrounds and for recreation, light and air. Iannucci provided such an area when he submitted the original map in

1976 when the defendant was his partner. That same map was used for each presentation to the PZC including the last one in 1986, without any change. The defendant never said to the PZC he would not set aside such an area and he continued to provide at every opportunity . The Town counsel, when he insisted on the defendant providing a deed for that lot, was simply following the mandate of the subdivision regulations, which would enable the applicant to present an acceptable application. The defendant was never told he must deed the lot, he was told it was a requirement of the subdivision regulations. It was the defendant's statement that he was under duress "because I had to give up something," however he admits he asked no official about open spaces because it was in the regulations. "Where one insists on a payment which he honestly believes he is entitled to receive, certainly unless that belief is without any reasonable ground, his conduct is not wrongful and does not constitute duress." Smedley Co. v. Landsing, 35 Conn. Supp. 578, 580. The town attorney honestly believed the PZC was entitled to receive the open space by virtue of the subdivision regulations and that belief was reasonable and therefore his conduct was not wrongful and did not constitute duress. See Crittenden v. Royce, 100 Conn. 617. "It is inherent in duress that the acts or threats, claimed to constitute, it should be wrongful. Restatement Contracts, Vol 2, Sec. 492, Par. (g), p.941." Werner v. Minor, 124 Conn. 92, 95. "Where one insists on a payment which he honestly believes he is entitled to receive, certainly unless that belief is without any reasonable ground, his conduct is not wrongful and does not constitute duress." Werner v. Minor, supra, 95. The defendant has failed to demonstrate duress by a preponderance of the evidence, or by any other degree of evidence.

The next issue raised by the defendant is that the regulation is unconstitutional in that it did not substantiate a legitimate town interest. The defendant first states that the regulations' constitutionality does not have to be considered since the taking was outside the scope of Sec. 3.4 which only allowed a taking of open spaces for parks and playgrounds and not to provide a vacant lot. The PZC regulations must be read as a whole and include the statement preceding Sec. 3.4 to the effect that they are to provide for open spaces for parks and playgrounds, for open spaces for recreation, light and air. While the lot has had no altercations

or improvements to it since 1986, it could, if and when the need develops, become a park or playground. Just leaving it undeveloped does not mean that it could not at the appropriate point be developed into a park or playground. In addition, as it exits now, it provides light and air, two of the purposes of the regulations. The defendant claims that Nollan v. California Coastal Comm., 483 U.S. 825, 841, is controlling, wherein the court stated: "our cases describe the condition for abridgement of property rights through the police power as a substantial advancing of a legitimate state interest." That case differs from the instant case in that the Commission made the issuance of a building permit conditional on a public easement for passage of the public to the beach. This restriction is applicable to all of the landowners' land i.e. the open space and is a restriction created specially for this piece of property and not of all property owners. The instant case concerns one lot out of eleven and the restriction is applied equally to every subdivision of more than ten acres or ten lots in the town, and in accordance with Nollan, it substantially advances a legitimate state and town interest, declared in Sec. 8-23 Connecticut General Statutes entitled "PLAN OF DEVELOPMENT" and Sec.8-25 Connecticut General Statutes "Subdivision of Land" which provides for open spaces, parks and playgrounds. Aunt Hack Ridge Estates, Inc. v. Planning Commission, 160 Conn. 109 held that a similar regulation requring the land be set aside for open spaces, parks and playgrounds was valid and constitutional exercises of the police power of the town and the state statutes. "The party challenging a statute's constitutionality has a heavy burden of proof. The unconstitutionality must be proven beyond all reasonable doubt." Bottone v. Westport, 209 Conn. 652, 657. "If the ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional." Russo v. East Hartford, 179 Conn. 250, 258. " We have held that a commission's power to regulate the use of land, where reasonable and important, does not constitute a taking of property without due process of law or just compensation. . . .Where the free exercise of one's rights of property is detrimental to the public interest, the State has the right to regulate reasonably such exercise of control under the police power. . . .One who chooses to engage in subdividing land by that decision thus chooses also to be subject to the reasonable regulation of the local planning commission."

Whittaker v. Zoning Board of Appeals, 179 Conn. 650. The unconstitutionality of the PZC's zoning regulations with respect to the requirement for open spaces, parks and playgrounds has not been proven beyond all reaonable doubt. The lot is a "passive park", i.e., it is set aside for that purpose and can be utilized at any point. The "Plan of Development" of Monroe provides in Sec. 6. . . "Recreation and Open Space, Opportunities for passive and active recreation in locations accessible to residents and preservation of the ecological balance and exhaustible natural resources of the area are essential to the continued health and economic well being of the community." That section sets as policy that open space be within a reasonable distance of all residents' homes, and that recreational facilities and programs should be available; and that the town adopt a schedule of open space acquisition providing for all types of activities. It therefore serves legitimate governmental purposes and substanitally advances legitimate state and town interests, both which are described in the state statutes in Sec.8-23 and Sec.8-25 of the Connecticut General Statutes and the PLA Regulations, and which are a valid exercise of the town's police powers. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365; Agins v. City of Tiburon, 447 U.S. 259, 261 n.8.

Because of the rulings herein before made, it is not necessary to discuss the defendant's claim of a constructive trust of the lot and the remedy therefore.

Query as to whether the defendant's counterclaim is legally involved in this case since, while the counterclaim arises out of the same subdivision, the complaint involves two lots of the subdivision on which taxes are due and owing and the counterclaim involves a third lot which was deeded for open space. It would appear that the complaint and counterclaim do not arise out of the same transaction, nor do they arise out of any transaction which is the subject of the plaintiff's complaint.

Judgment may enter for the plaintiff on the complaint granting a strict foreclosure on the premises known as 2 Fairlea Drive for the tax liens for October 1, 1986, 1987, 1988, 1989, and 1990. The total debt due thereon is found to be $14,861.25 which includes interest and fees as of August 2, 1993. The value of the premises is found to be

$85,000.00. The law day for the defendant landowner is set as February 8, 1994, for the encumbrancer Federal Deposit Insurance Corporation as Feruary 10, 1994, and for the encumbrancer New England Building Products, Inc. February 9, 1994. A strict foreclosure on 36 Fairlea Drive may enter for the tax liens of October 1, 1986, 1987, 1988, 1989 and 1990. The total debt found to be due thereon is found to be $13,235.28 as of August 2, 1993, including interest and fees. The value of the premises are found to be $95,000.00. The law day for defendant landowner is set as February 8, 1994, for the encumbrancer New England Building Product, Inc. February 9, 1994, and for the defendant the Gateway Bank the date of February 10, 1994,on its mortgage dated October 24, 1990; February 11, 1994 on its mortgage dated July 21, 1989 and February 12, 1994 on its mortgage dated October 24, 1988.

Judgment may enter for the plaintiff on the Counterclaim and Set Off together with costs. The plaintiff is further entitled to recover interest from August 2, 1993 to the day of redemption.

Levine
LEVINE, STATE TRIAL REFEREE

6. ORDER OF THE APPELLATE COURT OF CONNECTICUT DENYING REQUEST TO POSTPONE ORAL ARGUMENT

NO. A.C. 12922 : APPELLATE COURT

TOWN OF MONROE: STATE OF CONNECTICUT

VS.
JOHN C. MANDANICI : APRIL 21, 1994

ORDER

THE MOTION OF THE DEFENDANT-APPELLANT, FILED APRIL 21, 1994, TO POSTPONE ORAL ARGUMENT,

HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY

ORDERED DENIED

BY THE COURT,

Alan M. Ganusscio
ASSISTANT CLERK-
APPELLATE